

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

DAVID MCCAIG, INDIVIDUALLY AND
AS THE REPRESENTATIVE OF THE
ESTATE OF ALLIE VIDA MCCAIG,

Plaintiff,

v.

WELLS FARGO BANK (TEXAS), N.A.

Defendant

Civil Action No. 2:11-cv-00351

WELLS FARGO BANK, N.A.'S
MOTION TO COMPEL PLAINTIFFS TO REIMBURSE FEES AND COSTS

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

COME NOW WELLS FARGO BANK, N.A. ("Wells Fargo"), and files this Motion to Compel Plaintiffs to Reimburse Fees and Costs (the "Motion") associated with the travel and preparation for the deposition of Wells Fargo's corporate representative, and in support hereof would respectfully show the Court as follows:

I.
RELIEF REQUESTED

1. Wells Fargo requests that this Court Order Plaintiffs and/or Plaintiffs' counsel to reimburse Wells Fargo (by a date to be determined by the Court) for reasonable and necessary fees and travel costs incurred as a result of Plaintiffs' last minute cancellation of the deposition of Wells Fargo's corporate representative. This deposition was scheduled for more than two (2) months.

2. Wells Fargo incurred reasonable and necessary attorneys' fees of \$2,920.00 in preparing for its deposition and in filing and prosecuting this Motion. *See Exhibit "C," Affidavit in Support of Attorneys' Fees.*

3. Wells Fargo is calculating its reasonable and necessary travel expenses and will supplement this Motion upon final calculation.

4. Wells Fargo requests that Plaintiffs not be given additional time to respond to Wells Fargo's Second Motion for Summary Judgment.

II. JURISDICTION

5. This Court has jurisdiction over this Motion by virtue of Fed. R. Civ. P. 30(g) which states, in part, that "[a] party who, expecting a deposition to be taken, attends in person or by an attorney may recover reasonable expenses for attending, including attorneys' fees, if the noticing party failed to attend and proceed with the deposition."

III. BASIS FOR MOTION

6. On November 14, 2012, Plaintiffs and Wells Fargo agreed that the deposition of Wells Fargo's corporate representative, Michael J. Dolan, would take place on January 17, 2013, at 10:00 a.m. at Wells Fargo's counsel's office in Houston. *See Exhibit "A," E-mail communication with counsel.* January 17, 2013, was Mr. Dolan's first available date.

7. Mr. Dolan, Wells Fargo's Research and Mediation Manager, scheduled a special trip to Houston for his deposition. On November 14, 2012, Plaintiffs served Wells Fargo with its Notice of Deposition. *See Exhibit "B."* Mr. Dolan's deposition has been scheduled for more than two (2) months.

8. On December 19, 2012, Plaintiffs requested additional time to respond to Wells Fargo's Second Motion for Summary Judgment on the grounds that she needed Mr. Dolan's testimony to file her Response [Docket No. 59]. On December 19, 2012, this Court granted

Plaintiffs' Motion and extended their Response deadline to January 25, 2013 [Docket No. 60]. This Court should not consider any further requests to extend Plaintiffs' Response deadline.

9. On Wednesday, January 16, 2013, Mr. Dolan traveled to Houston. Wells Fargo has incurred travel expenses for Mr. Dolan's trip to Houston for his deposition. Wells Fargo incurred attorneys' fees in preparing for Mr. Dolan's deposition.

10. Despite having more than a week's notice, at 4:02 p.m. on Wednesday, January 16, 2013, Plaintiffs' counsel e-mailed Wells Fargo's counsel advising that she is cancelling Mr. Dolan's deposition scheduled for 10:00 a.m. the next morning (January 17, 2013). Mr. Dolan already traveled to Houston for his deposition. Before January 16, 2013, at 4:02 p.m., there was no indication that Mr. Dolan's deposition would not go forward as scheduled.

11. Based on (i) the last minute cancellation, (ii) lack of advance notice or warning, (iii) the inconvenience to counsel and Mr. Dolan, and (iv) out of pocket fees and expenses incurred, counsel requested, at a minimum, reimbursement for Mr. Dolan's travel expenses and attorneys' fees. Ms. Robinson refuses to pay travel expenses and attorneys' fees. Plaintiff thereafter demanded that Wells Fargo present Mr. Dolan on an unspecified date and time in the near future. Mr. Dolan has a heavy schedule involving national travel. Mr. Dolan has no immediate availability.

12. The discovery deadline passed on November 16, 2012. Trial is scheduled for April 15, 2013. Wells Fargo's meritorious Second Motion for Summary Judgment has been pending since December 12, 2012. Plaintiffs' extended Response deadline is January 25, 2013.

13. Wells Fargo has incurred attorneys' fees and travel expenses that it otherwise would not have incurred but for Plaintiffs' conduct. Equity favors Wells Fargo. There is no basis for Plaintiffs to cancel the deposition at the eleventh hour.

IV.
CERTIFICATE OF CONFERENCE

14. On January 16, 2013, Branch M. Sheppard conferred in good faith with Plaintiffs' counsel, Savannah Robinson, and attempted to resolve this matter without filing this Motion. Ms. Robinson will not agree to the relief requested in the Motion. Wells Fargo has no choice but to file this Motion. Mr. Sheppard conferred with Ms. Robinson regarding the filing and basis for this Motion. Ms. Robinson opposes the Motion.

V.
PRAYER

WHEREFORE, PREMISES CONSIDERED, Wells Fargo requests that the Court grant Wells Fargo (i) relief as requested in paragraphs 1, 2, 3, and 4 herein and (ii) such other and further relief at law, and in equity, as is just.

Respectfully submitted,

By: //s// George A. Kurisky, Jr.
George A. Kurisky, Jr.
TBA No. 11767700

OF COUNSEL:

JOHNSON DELUCA KURISKY & GOULD, P.C.

Branch M. Sheppard
TBA No. 24033057
4 Houston Center
1221 Lamar, Suite 1000
Houston, Texas 77010
(713) 652-2525 – Telephone
(713) 652-5130 – Facsimile

**ATTORNEYS FOR DEFENDANT,
WELLS FARGO BANK N.A.**

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Motion to Compel was sent to counsel for Plaintiffs by facsimile and electronic service by the Court's CM/ECF system if he has consented thereto on this the 17th day of January, 2013, as follows:

Via facsimile (979) 922-8857

SAVANNAH ROBINSON
1822 MAIN
DANBURY, TEXAS 77534

//s// George A. Kurisky, Jr.
George A. Kurisky, Jr.